Office Supreme Court U.S.
FILED
OCT 24 1901
JAMES H. McKENNEY,
Clerk.

No. 307

Brf. of Tifft for P. E.

BRIEF OF PLAINTIFFS IN ERROR.

Filed Oct. 24, 1901.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No. 307.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH INVESTMENT CO. AND FRED N. PENDLETON, Plaintiffs in Error,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE COMMON COUNCIL OF SAID CITY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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(18,136)

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BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This case involves the validity of the Charter of the City of Portland, Oregon, in relation to the method of assessment for street improvements.

There was a demurrer to the complaint in the trial court below, which was overruled, and the defendants answered.

The complaint alleges that the plaintiffs in error are severally owners of certain lots in the City of Portland, abutting on the street, for the improvement of which the assessments in question were levied.

The improvement itself consists of an elevated roadway extending east and west from the east curb line of East Water Street, to the west line of Union Avenue in said city, and is elevated above the ground below, and above the property of the plaintiffs in error, from twenty to thirty-five feet high, varying in height at different places owing to the unevenness of the ground.

For a better understanding of the situation of the improvements, with relation to the property, we insert here a draft of the same.

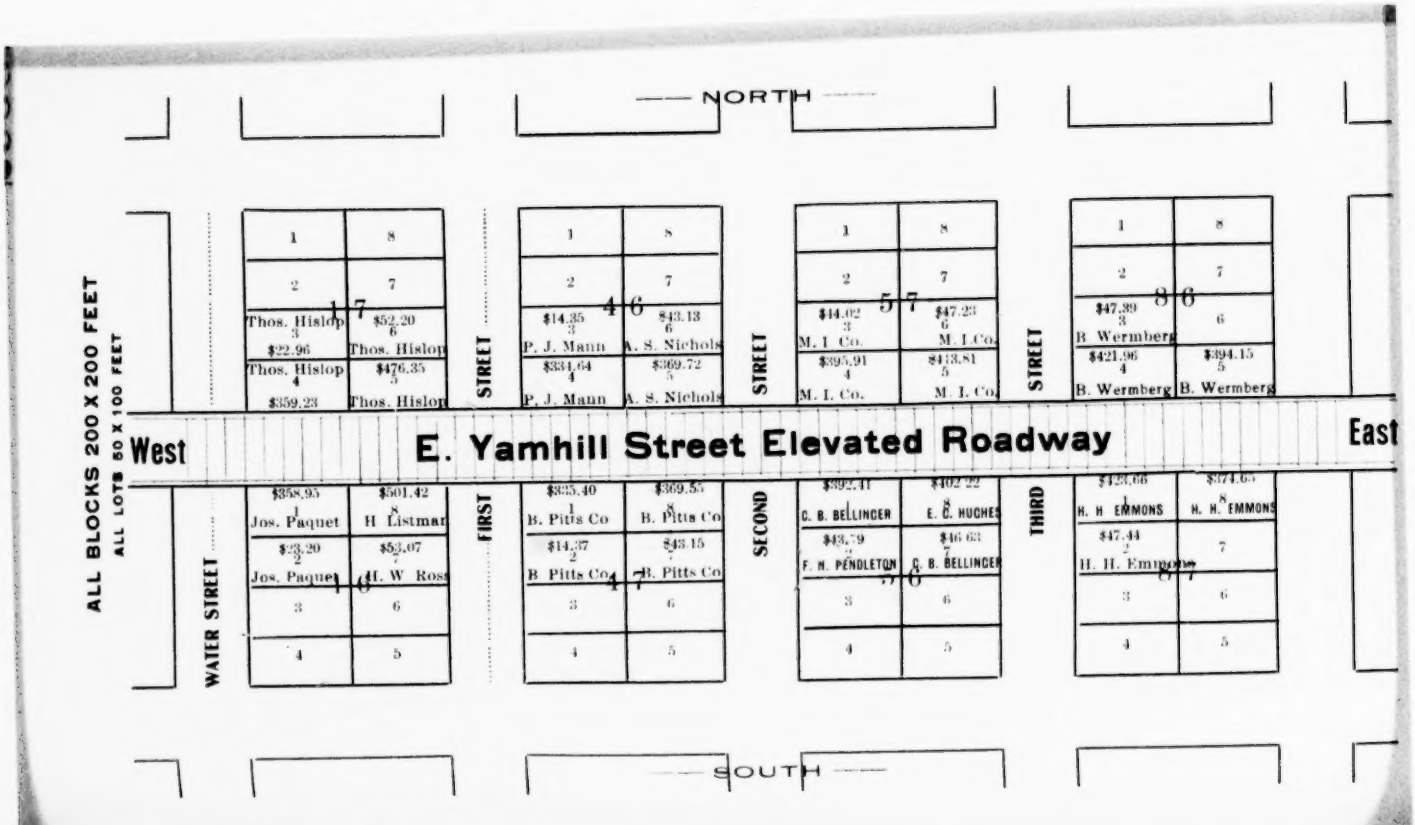
The complaint sets forth the proceedings of the Common Council of the City of Portland, and of the Board of Public Works, and of the other offices of this city, which are in substantial compliance with the provisions of the Charter.

On the 16th day of November, 1898, the City Engineer recommended the improvement of the said street, by grading the intersection of East First Street to the established grade, and covering the roadway with fir planks on mud sills, and constructing a roadway according to the plans and specifications reported to the Common Council.

On the same day the engineer filed his specifications for said work, which required pile bents and piles to be driven into the ground, joists and floor covering, and other descriptions not pertinent to the questions here.

On the same day the City Council adopted a resolution to the effect that notice should be given of the said improvement, and on the 23d day of November, 1898, the engineer gave the said notice, substantially as required by the Charter.

On the 12th day of December, 1898, F. N. Pendleton, the Multnomah Investment Co., and other persons affected by said improvement, who are not in this case, filed their remonstrance against said improvement, and stated in said remon-


NORTH
ALL BLOCKS 200 X 200 FEET
ALL LOTS 50 X 100 FEET
WATER STREET
FIRST STREET
SECOND STREET
THIRD STREET
West
E. Yamhill Street Elevated Roadway
East
SOUTH
Thos. Hislop $22.96
Thos. Hislop $359.23
Thos. Hislop $52.20
Thos. Hislop $476.35
Jos. Paquet $358.95
Jos. Paquet $23.20
H Listman $501.42
H. W. Ross $53.07
P. J. Mann $14.35
P. J. Mann $334.64
A. S. Nichols $43.13
A. S. Nichols $369.72
B. Pitts Co $335.40
B. Pitts Co $14.37
B. Pitts Co $43.15
B. Pitts Co $369.55
M. I. Co. $14.02
M. I. Co. $395.91
M. I. Co. $47.23
M. I. Co. $413.81
C. B. BELLINGER $392.41
F. H. PENDLETON $43.79
C. B. BELLINGER $402.22
E. C. HUCHES $46.63
B. Wermberg $47.39
B. Wermberg $421.96
B. Wermberg $394.15
H. H. EMMONS $423.66
H. H. EMMONS $47.44
H. H. Emmons

strance as their reason therefor, that they deemed the cost of the same was not warranted by the benefits that would accrue to the property by reason of said improvements.

On the 21st day of December, 1898, the Common Council overruled said remonstrance.

On the 21st day of December, 1898, the Common Council passed an ordinance which was approved next day, providing the time and manner of improving said street.

On the 23d day of January, 1899, the engineer reported his estimate to the Common Council, of the amount of lumber and material that would be required to make said improvement segregating and designating the amount on each lot affected thereby.

On the 17th day of January, 1899, the Chairman and Clerk of the Board of Public Works gave notice by publication in a newspaper for sealed proposals for the work of making said improvement.

Thereafter, the defendants, Lind & Manning, furnished proposals for the work, as follows:

Opposite blocks 17 and 16.....	$1753.12
Opposite blocks 46 and 47.....	1487.44
Opposite blocks 57 and 56.....	1718.82
Opposite blocks 86 and 87.....	1602.24
Total	$6561.62

Lind & Manning being the lowest bidders, were awarded the contract at their figures.

On the 23d day of May, 1899, the City Engineer, having reported the completion of the work in accordance with the contract, the Board of Public Works approved and accepted the work. Before that day, however, and on the 9th day of May, 1899, the Clerk of the Board of Public Works duly gave notice of the completion of said work, and that

objections to the acceptance of the same might be filed with the board, on or before the 16th day of May, 1899.

On the 16th day of May, 1899, the Common Council passed an ordinance declaring the probable cost of making the improvement, assessing the same, and directing an entry of said assessment, on the Docket of City Liens, and ascertained the probable cost of the improvement at $6850.96, assessed to the several lots, and parts of lots, the amount set opposite the number and description thereof, and directed the auditor to enter a statement of the said assessment made, in the docket of city liens, and to cause notice thereof to be published as provided in the city charter, which was done.

The assessments are as follows:

Blk.	Lot.	Owner.	Ass'm't.
17	4	Thomas Hislop	$ 359.23
17	3	Thomas Hislop	22.96
17	6	Thomas Hislop	52.20
17	5	Thomas Hislop	476.35
46	4	P. J. Mann	334.64
46	3	P. J. Mann	14.35
46	6	A. S. Nichols	43.13
46	5	A. S. Nichols	369.72
57	4	Multnomah Investment Co.	395.91
57	3	Multnomah Investment Co.	44.02
57	6	Multnomah Investment Co.	47.23
57	5	Multnomah Investment Co.	413.81
86	4	B. Wermberg	421.96
86	3	B. Wermberg	47 39
86	5	B. Wermberg	394.15
16	1	Joseph Paquet	358.95
16	2	Joseph Paquet	23.20
16	7	H. W. Ross	53.07
16	8	H. Listman	501.42
47	1	Buffalo Pitts Co.	335.40
47	2	Buffalo Pitts Co.	14.37

47	7	Buffalo Pitts Co.	43.15
47	8	Buffalo Pitts Co.	369.55
56	1	C. B. Bellinger	392.41
56	2	Fred N. Pendleton	43.79
56	7	C. B. Bellinger	46.63
56	8	Ellis G. Hughes	402.22
87	1	H. H. Emmons	423.66
87	2	H. H. Emmons	47.44
87	8	H. H. Emmons	374.65
		Total	$6850.96

The ordinance further authorized the mayor and auditor to draw warrants on the fund to be raised by the assessment in favor of the persons entitled thereto, whenever the improvement should be accepted by the Board of Public Works.

The ordinance declaring the probable cost as aforesaid was not determined until after the contract had been let and fully completed; and the cost of the plans and specifications and preliminary services were reported by the engineer to the Board of Public Works on the 9th day of May, 1899, to be at $278.90, which were added to the cost of improvement, and included in the assessment as hereinbefore set forth.

That when the ordinance making said assessment was passed, the Common Council caused a notice to be given to each of the owners of the property requiring them to pay the amount of their assessment within ten days.

On the 15th day of September, 1899, the plaintiffs, not having paid their pretended assessments, a warrant was issued in form as required by the charter for their collection, and the property ordered to be sold by the chief of police, and he was proceeding to sell the same in accordance with the directions of the charter, when this suit was brought.

The plaintiffs in error, in their complaint, charged that in taking the proceedings as before related, the Common Council

did not take into consideration whether the property of the plaintiffs was benefited by the said proposed improvement, or the amount, if any of said benefits, and did not apportion the costs of making the said improvements, according to the benefits to said property, but on the contrary, assessed to each lot abutting on said street, the cost of improvement on the one-half street in front of it, and assessed on the lots not abutting on the street, for the improvement of the intersection of said street, four-ninths of the cost of the intersection nearest thereto, and that the Common Council pretended to make the assessment in pursuance of the provisions of Section 138 of the act of the legislature incorporating the City of Portland, filed in the office of the Secretary of State on the 17th of October, 1898, and the complaint further shows that the assessments were not equal or uniform as between the lots.

It is further charged that the property of the plaintiffs in error cannot be used in connection with the roadway, and is not accessible from the roadway but lies wholly far below the level thereof, and by reason of its physical situation, is not, and cannot be benefited in any particular by the improvement, and that the costs far exceed any possible benefits that may accrue to said property, if any, by reason of said improvement.

The plaintiffs in error further say that they or any of them did not have any notice or knowledge of the amount of said assessment at any time before they were made, or before they were entered in the Docket of City Liens, or before the contract was fully completed by the contractors, and had no opportunity to be heard to contest the fairness of the said apportionment, or whether their property was benefited, or the amount of their assessments, and further,

That the charter and ordinances of the City of Portland do not provide for any notice to be given of the making

of said assessments to the property, unless affected by the same.

The complaint further charges that the city authorities acted arbitrarily and unjustly, and did not use or exercise any discretion or judgment concerning the same.

The plaintiffs in error contended in their complaint that all of the proceedings set forth are null and void, and constitute an attempt by the city and its authorities to take the property of plaintiffs away from them without due process of law, and contrary to the Fourteenth Amendment to the Constitution of the United States prohibiting any state from taking any property without due process of law, and contrary to the Constitution of the State of Oregon, particularly of Section 4 of Article 11, Section 32, Article 1, Section 18, Article 1 of the said State Constitution.

The plaintiffs in error further contend in their complaint that the act of the legislature, constituting the Charter of the City of Portland, in respect of the matters set forth, is opposed to the provisions of the Fourteenth Amendment of the Constitution of the United States, and of the several provisions of the State Constitution hereinbefore referred to; and because the method of assessment provided in said act or in the ordinances passed in pursuance thereof, make the said assessments depend solely upon the cost of the improvements on the one-half street in front of the property, and not in any manner upon the question whether the said property is benefited by the same, and also in this:

That the cost of the whole improvement is not permitted or authorized to be apportioned among or between the owners of property affected by the improvement, but that each lot is, by the charter and ordinances, made a taxing district.

Upon the overruling of the demurrer, the defendants filed an answer denying that the City Engineer did not make or report an estimate of the probable cost of the improve-

ment, or that the Common Council did not estimate the cost thereof, or give any notice of the probable cost.

They also deny that the Common Council did not take into consideration the benefits, and did not apportion the costs according to the benefits, but charged that the proceedings set forth in the complaint were all done in strict compliance with the Charter of the City of Portland.

They also deny that the property is not, and cannot be used in connection with the roadway, and deny that no part of it is accessible from the roadway, and deny that by reason of the physical situation, that the property cannot be benefited.

Deny that the costs exceed or equal the benefits accruing to the property.

They also deny that the plaintiffs did not have notice or knowledge of their assessments before they were made or entered in the Docket of City Liens, or before the work was completed, and

Deny that the defendants did not have an opportunity to be heard to contest the fairness of said apportionment.

They also deny that the Council or the Board of Public Works acted arbitrarily and unjustly, and did not use or exercise discretion in making the same.

They also deny the legal conclusions as to the validity of the charter as set forth in the complaint.

The case was tried and evidence offered of the members of the Common Council in respect of the questions made by the denials, and the Court made Findings of Fact in favor of the defendant upon all these questions.

Upon the question of notice or knowledge by the plaintiffs in error of the amount of their assessments before they were made or entered in the Docket of City Liens, or before the work was completed, a stipulation was made in open

court that the plaintiffs in error did not have any notice or knowledge thereof other than as stated in the complaint and the proceedings therein set forth.

It will be noticed that since the proceedings are in substantial compliance with the charter, that the important question here is as to its validity.

These questions were raised in the Supreme Court of Oregon on the appeal under the following assignments of error.

ASSIGNMENT OF ERRORS IN SUPREME COURT OF OREGON.

1. The Court erred in holding that the Charter of the City of Portland is not in conflict with the following provisions of the Constitution of the State of Oregon, to wit: Article 1, Section 18, in this: That said charter provides for the taking of private property for public use without just compensation. And with Article 1, Section 10 thereof, in this: That the plaintiff, by said charter, is deprived of his remedy by due course of law for the injury done him in person and property by the said assessment, and also with Article 9, Section 1, in this: That the said law does not provide for uniform and equal rate of assessment and taxation for said improvement, and does not prescribe such regulations as secure a just valuation for said taxation of the property affected by said assessments. And Article 1, Section 32 of the said Constitution of the State of Oregon, in this: That the taxation provided for in such charter is not equal and uniform.

2. The Court erred in deciding that the said Charter of the City of Portland is not in conflict with the Fourteenth Amendment of the Constitution of the United States, in this: That it provides for the taking of plaintiff's property with-

out due process of law; and also in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it provides for taking plaintiff's property without just compensation.

3. The Court erred in holding that notice to the plaintiff was not necessary before the said Common Council could make a valid assessment for the said repairs against its property.

4. The Court erred in holding that the plaintiff had notice before said assessments were made.

5. The Court erred in deciding that the provision of the Charter of the City of Portland, under and by virtue of which the plaintiff built the bridge in question, is not a contract, and the said charter does not impair the obligation of said contract, which holding is in conflict with the Constitution of the United States, that provides that a state shall not pass any law impairing the obligation of contracts.

6. The Court erred in holding that the City Engineer did make a report and estimate of the probable cost of the improvement.

7. The Court erred in holding that the Common Council did, before making said improvement, estimate the probable cost thereof, and give notice of said probable cost.

8. The Court erred in holding that said Common Council did apportion the cost of making the said improvement according to the benefits to the said property from said improvement.

9. The Court erred in holding that the property set forth in the complaint can be used in connection with said roadway, or that it is accessible from said elevated roadway, or that it is or can be benefited by said roadway.

10. The Court erred in holding that the costs assessed do not exceed the benefits.

11. The Court erred in holding that the plaintiffs, or any of them, had notice of the amounts of their respective assessments before the same were made or entered in the city lien docket, or before the work was completed, or that any of them had an opportunity to be heard to contest the fairness of said apportionment or the benefits or assessments.

12. The Court erred in holding that the Common Council or the Board of Public Works did not act arbitrarily or unjustly or used discretion and judgment.

13. The Court erred in holding that the Council had jurisdiction to assess the cost against the plaintiffs' property after the work had been fully completed by the contractor.

14. The Court erred in holding that the Council could make the assessments without taking into consideration the benefits or injuries.

15. The Court erred in holding that notice was not necessary before the Common Council could make a valid assessment.

16. The Court erred in holding that the benefits to the property could be estimated upon the assumption that the property might be built on so as to bring the same up to the grade of the roadway.

In this court, the plaintiffs in error set forth and rely substantially upon the same errors assigned in the court below, with some additional specifications, based upon the opinion of the Supreme Court of Oregon. This assignment of errors is as follows:

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the act of the Legislative Assembly of the State of Oregon, entitled "An act to incorporate the City of Portland and to provide a

charter therefor, and to repeal all acts or parts of acts in conflict therewith," enacted at the session of 1898, and filed in the office of the Secretary of State, October 17, 1898, and particularly Chapter 13 thereof, relating to streets, their grades and improvements, comprising Sections 126 to 159 thereof, inclusive, is not in conflict with the following provisions of the Constitution of the State of Oregon, to wit: Article 1, Section 18, in this: That said charter provides for the taking of private property for public use without just compensation; and with Article 1, Section 10 thereof, in this: That the plaintiff by said charter is deprived of his remedy by due course of law for the injury done him in person and property by the said assessment; and also with Article 9, Section 1, in this: That the said law does not provide for uniform and equal rate of assessment and taxation for said improvements, and does not prescribe such regulations as secure a just valuation for said taxation of the property affected by said assessments; and Article 1, Section 32 of the said Constitution of the State of Oregon, in this: That the taxation provided for in such charter is not equal and uniform.

2. The Court erred in deciding that the said Charter of the City of Portland, and the assignments thereof enumerated in Assignment No. 1, are not in conflict with the Fourteenth Amendment of the Constitution of the United States, in this: That they provide for the taking of plaintiffs' property without due process of law, and also in conflict with the Fourteenth Amendment of the Constitution of the United States in that they provide for taking plaintiffs' property without just compensation.

3. The Court erred in holding that notice to the plaintiff was not necessary before the said Common Council could make a valid assessment for the said repairs against its property.

4. The Court erred in holding that the plaintiff had notice before said assessments were made.

5. The Court erred in holding that Section 138 of said charter is not in conflict with the Fourteenth Amendment to the Constitution of the United States, prohibiting a state from depriving any person of his property without due process of law and without compensation, in providing for the assessment of the whole cost of improving or repairing the half street in front of each lot or parcel of land upon said lot or parcel, and in providing that the whole cost of repairing or improving the intersection of streets shall be assessed upon the lots or parts thereof within the quarter blocks nearest thereto in the proportion of five-ninths to the corner or first fifty feet, and four-ninths to the lot next inside, or the next fifty feet.

6. The Court erred in holding that Section 139 is not in conflict with the said provisions of the said Fourteenth Amendment, in providing that the Common Council shall declare by ordinance the probable cost of said work or improvements, as ascertained under the provisions (Section 138), and enter the same in the city lien docket, and without providing or permitting any notice to the property-owner of his proportion of said assessment, or providing or permitting any tribunal or hearing before any tribunal to question the just amount of his assessment, or the amount of his special benefits.

7. The Court erred in holding that Sections 140 and 141 of said charter are not in conflict with the said provisions of said Fourteenth Amendment, in providing that such assessments so declared and entered in the city lien docket shall be a lien on the property entered therein.

8. The Court erred in holding that the notice required to be given of the proposed improvement by Section 128 of said charter, and referred to in Sections 129 and 130, is a

sufficient notice to the property-owner to allow him to contest the special benefits he may receive by said improvements, or the just amount of his assessment.

9. The Court erred in holding that said notice required by Sections 128 and 129 gave the property-holders an opportunity to appear or file objections to the said improvement, and that it was competent for them to raise both the objections that as a district, the costs would be in excess of the exceptional benefits to the property involved, and that as respects individual holders, and between themselves, the assessments would not be proportional to the relative benefits to be derived from the improvement, or competent to raise either of said objections.

10. The Court erred in holding that under said Sections 128, 129 and 130, or any other provisions of said charter, the Common Council had an opportunity to hear and determine both or either of said objections mentioned in the last assignment, and in holding that they had power and authority to stop said improvements, and to change or alter the amount of the assessments of any property, and in not holding that said notice was solely for the purpose of allowing the owners of more than one-half of the property abutting on said improvement to defeat the proposed improvement by a remonstrance without any reference to special benefits or the just amount of their respective assessments.

11. The Court erred in holding that the notice required by Section 132 of said charter, inviting proposals to do the work, and the notice required in Section 137, touching the acceptance of the work, and the notice required by Section 141, of the entry of the assessments in the Docket of City Liens, afford, and that either of them afford, ample, or any opportunity to appear and interpose constitutional objections, and in holding that the property-owner under said notices, or either of them, had any right to appear and ob-

ject that his said assessment was in excess of special benefits, or that it was not a fair or just proportion of the whole cost of said improvement, and in holding that the said Council or the Board of Public Works had power and authority to determine any constitutional objection, or power to hear or determine the question of special benefits or just apportionment of said assessments or to alter said assessments in any particular when ascertained as provided in said charter.

12. The Court erred in holding that the supposed uniformity of the cost of the work in this particular case is any test of the constitutionality of said charter, or the said sections thereof.

13. The Court erred in holding that the cost of the work in this case was particularly uniform throughout.

14. The Court erred in holding that the constitutionality of the said charter is the only constitutional question raised here, and in not holding that there was no notice of said assessments given to plaintiffs, and that no notice was necessary except the notices mentioned in the foregoing assignments.

15. The Court erred in holding that the assessments against these lots were as nearly proportional to benefits as could be devised, and in not holding that said assessments were not in any degree proportional to benefits.

16. The Court erred in holding that plaintiffs' property was in any degree specially benefited by said improvement.

17. The Court erred in holding that there were no substantial costs above benefits.

18. The Court erred in holding that the legislature did, by said charter ascertain the taxing district in this case, or that it did determine beforehand that said property would be specially benefited to the amount of said assessments.

19. The Court erred in holding that the plan of assessment provided in said charter provides for any ascertainment by either the Common Council or the legislature of the special benefits, or provides for any apportionment whatever of the whole cost of the improvement.

20. The Court erred in not holding that the said plan of assessment does arbitrarily fix the amount of said assessments, without reference to any special benefits and without any apportionment whatever.

21. The Court erred in not holding that from the peculiar situation of the property, and the character of the improvements as an elevated roadway, it could not possibly be specially benefited, and in holding from the evidence in the case that general and not special benefits are sufficient to justify the assessments.

22. The Court erred in holding that the long existence of this method of assessment in Portland has, in effect, become a rule of property.

23. The Court erred in holding that it was not in conflict with the said Fourteenth Amendment, as aforesaid, for the Common Council to ascertain the cost of said improvement, and assess the plaintiffs' property therefor, and enter the same upon the city lien docket, not until the said work was fully completed, and without giving plaintiff notice of the amount of said assessments before the same were entered in the city lien docket and became liens upon plaintiffs' property.

24. The Court erred in holding that it was due process of law and so not in conflict with the said Fourteenth Amendment for the Common Council or the legislature not to provide a tribunal with power to hear objections to the amount of plaintiffs' assessment before the assessments, after being made, were entered upon the city lien docket and became liens upon plaintiffs' property.

25. The Court erred in holding that the benefits to the property might be estimated upon the assumption that the property might thereafter be built on so as to bring the same up to the grade of the roadway, and in not holding that the benefits must be estimated upon the condition and situation of the property as it was then used by the owners.

26. The Court erred in holding that the said determination of the special benefits was not made arbitrarily and without using any discretion.

27. The Court erred in dismissing plaintiffs' complaint and in giving judgment against plaintiff for costs and disbursements.

And by reason of the foregoing errors and holdings, the appellants pray that the said decree may be reversed and a mandate entered that all of said proceedings set forth in the complaint be declared null and void, and said pretended liens be canceled and held for naught, and the threatened sale of plaintiffs' property by the said defendant, the chief of police, be perpetually enjoined, and for costs and disbursements, and such other and further relief as may seem meet and proper, and that they may be restored to all things which they have lost by reason of said decree.

Following are the sections of the charter involved.

CHAPTER XIII.

STREETS — THEIR GRADES AND IMPROVEMENTS.

Section 126. All streets, avenues, lanes or alleys within the corporate limits of the City of Portland, now open or dedicated to public use, or which may hereafter be opened or dedicated to public use, shall be deemed and held to be open public streets, avenues, lanes, or alleys for the purposes of this act, and the Common Council of said City of Portland is hereby empowered to establish and change the grades of said streets, avenues, lanes, or alleys, and fix the width

thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in Section 126 (127) of this act, in accordance with the directions and proceedings in this act hereinafter provided.

Section 127. Whenever the public interest or convenience may require, the Common Council is hereby authorized and empowered to order the whole or any portion, either in length or width, of the streets, avenues, lanes or alleys of the City of Portland, to be graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, and to order sidewalks, curbing, gutters, sewers, manholes, culverts and tunnels to be constructed or repaired therein, and to order any other work to be done which shall be necessary to complete the whole or any portion of said streets, avenues, lanes or alleys, or for the completion of any work or improvement done thereon or therein, or for the construction of any sewer or drain therein, and to order any of said work to be done in, over or through any right-of-way granted or obtained for such purpose; provided, however, and it is hereby expressly understood that neither the City of Portland, nor any officer thereof shall be liable for any portion of the cost or expense of any street work, improvement or the construction or repair of any sewer or drain by reason of the delinquency of persons or property assessed for the payment of said work, improvement, or sewer, or by reason of the inability of said City of Portland to collect assessments levied for the payment for such work, improvement, or sewer, as aforesaid, and no moneys shall ever be paid out of the general fund of the city on account of any such work, improvement, or the construction of streets or sewers, but the contractors doing such work shall be required to look solely to the property affected by such improvements and the owners thereof; provided, that the city may direct the payment out of the

general fund of the city of the cost of a repair when authorized and done in accordance and pursuant to Sections 159 and 160 of this act.

Provided, further, that the City Engineer shall, whenever a sidewalk is out of repair, notify the owner or owners, or their agents, or the occupant of the property fronting thereon (and if no owners, agents or occupants can be found to publish notice at least once in the city official newspaper notifying such owner or agent), to repair the same within five days from the date of the service or publication of such notice. And if such owner or owners, agents or occupants, fail to comply with said notice within the time specified, then the City Engineer shall report such failure to the Board of Public Works, and the said board shall, if it deems the same expedient, direct the City Engineer to make such repairs as are required, and the cost thereof shall be a lien upon the property fronting on such sidewalks as may be so repaired by said City Engineer, and shall be collected in the same manner as assessments for improvements of streets are collected.

Section 128. Before any work is done or improvement made, which is authorized by Section 127 of this act, except as otherwise prescribed in the preceding section, the Common Council shall pass a resolution of intention so to do, and describing the work or improvement, which resolution shall be posted conspicuously for ten days in the office of the Auditor, and shall be published for ten consecutive days in a daily paper published and circulated in the City of Portland. The City Engineer shall, within three days from the first publication of the notice herein provided for, also cause to be conspicuously posted at each end of the line of said contemplated work of improvement. Said notice shall be headed, "Notice of Street Work," in letters of not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resolution aforesaid, its date, and briefly the character of the work or improvement proposed,

and the time within which written objection or remonstrance may be made thereto. The engineer shall file with the Auditor an affidavit of the posting of said notices, stating therein the date and places where the same have been posted.

Section 129. Within ten days after the final publication of the notice required to be published in the preceding section, the owners of more than one-half of the property abutting on said proposed work or improvement may make and file with the Auditor a written objection or remonstrance against said proposed work or improvement, and said objection and remonstrance so filed shall be a bar to any further proceedings in relation to the doing of said work or making said improvement for a period of six months, unless the owners of one-half or more of the property abutting as aforesaid shall subsequently petition therefor. In case no such petition be filed at the expiration of six months, and the Common Council again propose to do the same work or make the same or a different improvement, the same proceedings shall be had in relation thereto as in the first instance.

Section 130. If no such written objection or remonstrance be made and filed, or if any written objection purporting to be signed by a majority of the owners of the property abutting on said proposed work or improvement be by said council found and determined not to have been legally signed by a majority of the owners of abutting property as aforesaid, the Common Council shall be deemed to have acquired jurisdiction to order the work or improvement described in said resolution of intention to be done. And said council shall thereafter, and within four months from the date of the final publication of said resolution of intention, declare by ordinance the time and manner of said proposed improvement, which shall conform in all particulars to the resolution of intention previously adopted by said council.

Section 131. Upon the approval of said ordinance by the Mayor, or if the same become valid without his approval, the Auditor shall immediately transmit a certified copy thereof to the Board of Public Works and the City Engineer. And said board shall include as a part of said cost of such work or improvement the cost of advertising all notices required by this act pertaining thereto, the cost of surveying and estimating the same, and the cost of necessary superintendence and inspection of said work or improvement while in process of being done.

Section 132. Said Board of Public Works shall, without delay, cause the City Engineer to prepare and file with said board, estimates and specifications in detail of the amount of such work or improvement, and shall thereupon give notice by publication for not less than five successive days in the city official newspaper, inviting proposals for doing the work or improvement so ordered by the Common Council, referring to the estimates and specifications on file therefor.

Section 133. Said Board of Public Works shall, at the time set, examine the proposals received, and let the work of improvement to the lowest responsible bidder, for either the whole of said work or improvement, or such subdivision thereof as will not materially conflict with the completion of the remaining portion thereof; but no bid shall be considered for a fractional part of said work or improvement less than contained in the entire width of a street, from the center of one cross street to another. The said board shall have and reserve the right to reject any or all proposals received by it, if it shall deem the same unreasonable or excessive, or which do not conform to the printed rules and regulations of said board relative to the manner of receiving proposals and letting contracts for street work. Proposals shall conform as nearly as possible to the estimate prepared by the City Engineer as to the amount and character of each kind of work; and no proposal or bid shall be considered unless

accompanied by a check, payable to the order of the Mayor of the city, certified by a responsible bank, for an amount equal to ten per cent. of the aggregate proposal, or by a bond for a like amount, and payable to the Mayor as aforesaid, signed by the bidder and two sureties, who shall justify before any officer competent to administer an oath in double the penal amount of said bond. The certified checks or bonds of unsuccessful bidders shall be immediately returned to them; but the checks or bonds accompanying the accepted proposals or bids shall be held by the Clerk of the Board of Public Works aforesaid, until the contract for doing said work or improvement has been entered into and a bond for the performance of said contract has been duly executed and approved, as hereinafter provided, whereupon the check or checks shall be returned. Should the bidder whose proposal has been accepted fail, neglect, or refuse (within five days after notice of such acceptance) to enter into a contract to perform said work or improvement so awarded to him or them, and to execute the bond required for the performance of such contract, as hereinafter provided, the certified check accompanying his bid and the amount therein mentioned shall be forfeited and paid to the City Treasurer and credited to the general fund of the city; and any bond forfeited as aforesaid shall be prosecuted and the amount due thereon collected and paid into the same fund.

If any successful bidder shall fail or refuse to enter into contract and give bonds as aforesaid, said board shall immediately advertise for proposals for the portion of such work as may have been awarded to him and award the contract therefor as in the first instance. The proposals of all persons who have failed to enter into contract as herein provided, shall be rejected in any bidding subsequent to the first for the same work. If any contractor who may have taken any contract does not complete the same within the time limited in such contract, or within such further time as the

Board of Public Works may grant him, the said board may relet the unfinished portion of the work, in the same manner as hereinbefore prescribed for letting the work in the first instance, and said delinquent contractor shall forfeit the cost of such reletting and the excess of cost, if any there be, for said unfinished work over the sum named in his contract. In all contracts for street work or improvement the price and amount of the several items of work shall be fully set forth in accordance with the estimate of the City Engineer and of the accepted proposal therefor.

Section 134. All contractors shall at the time of executing any contract for street work, execute a bond to the satisfaction of the Board of Public Works, to be approved by the Mayor, in such sum as they may deem adequate, and which sum shall not be less than the contract price for said improvement, with two or more sureties, and payable to the City of Portland conditioned for the faithful performance of the contract, and said sureties shall justify in double the amount mentioned in said bond, provided that the obligation of any solvent surety company may be accepted in lieu of individual sureties. Said bond shall be conditioned that the said contractor will fully secure and pay the just claims of all laborers, material-men, and sub-contractors employed by him under said contract. Any laborer, material-man, or sub-contractor whose just claims have not been paid or satisfied by any contractor for street work, shall have and is hereby granted the right of action upon the bond of said contractor in the name of the City of Portland, for the forfeiture of said contractor's bond, and said action shall have the same force and effect as if the said city was enforcing the forfeiture of said bond.

Section 135. The Board of Public Works is hereby authorized to make all written contracts and receive all bonds authorized by this chapter, and to do any other act, either

expressed or implied, necessary for the faithful carrying out of all contracts, and they shall fix the time for the commencement and completion of all contracts for street work, and may extend such time should extraordinary circumstances warrant. The work or improvement done under the provisions of this chapter shall be done under the supervision of the City Engineer and the Board of Public Works; and the materials used shall comply with the specifications and be to the satisfaction of said board and the City Engineer, and all contracts for street work of whatever kind must contain a provision to the effect and also an express notice that in no case, except it be otherwise provided in this act, will the City of Portland, or any officer thereof, be liable for any portion of the cost or expense of the work or improvement done thereunder, nor for any delinquency of persons or property assessed for the payment for said work or improvement.

Section 136. The assessment and apportionment of the expenses for all street work or improvement shall be made by the Auditor of the City of Portland in the mode and manner herein provided.

Section 137. Whenever any work or improvement, the expense of which is to be assessed against the property benefited thereby, has been completed in whole, or in such proportion as shall enable the said Board of Public Works to determine the cost of the whole thereof, the City Engineer shall file with the said board a written acceptance of such work so completed. Thereupon the said board shall publish a notice of such completion and acceptance for six consecutive insertions in the city official newspaper, stating therein a time and place where any written objections to the acceptance of said work or improvement, or portion thereof, may be heard, which time shall not be more than ten days after the date of the filing of said acceptance as aforesaid.

At the time set for hearing objections to the acceptance of said work any owner or agent of any property affected by said work or improvement may appear and file objections thereto, which shall be heard and determined by said board, and if it appear that said work or improvement has not been completed in accordance with the specifications and contract the said board shall direct the same to be so completed, and until so done the acceptance or acceptances aforesaid shall not be approved by said board. If no objections be filed to the acceptance of any work or improvement as herein provided, or if upon hearing the same, the board shall determine that the work or improvement has been completed according to the specifications and contract, it shall endorse its approval on said acceptance or acceptances, and thereupon file a copy thereof with the Auditor, together with a copy of the contract or contracts for the whole of said work or improvement, and the estimated expenses of engineering, superintendence and advertising, which expense shall be deemed a portion of the cost of such improvement.

Section 138. The Auditor shall thereupon prepare an assessment to cover the entire cost of such work or improvement, and apportion the same to the property affected thereby within the limits of such work or improvement, as declared by the ordinance authorizing the same in the manner following, viz., each lot or part thereof within the limits of a proposed street improvement abutting upon the street shall be liable for the full cost of making the same upon half of the street in front of and abutting upon it, and also for a proportionate share of the cost of improving the intersections of two of the streets bounding the block in which such lot or part thereof is situated. But when the land lying between the marginal line of the street to be improved and a line one hundred feet distant back from and parallel therewith shall not be laid off in lots and blocks, then the cost of said frontage improvement shall be assessed to the owner or

owners of the land within said one hundred feet of said improvement and shall be apportioned as follows: The tract of land lying between the line of said street and a line twenty-five feet distant from and parallel therewith shall be assessed fifty per cent. of the total cost of said frontage improvement; the tract of land lying between two lines respectively twenty-five and fifty feet distant from and parallel with the line of said street shall be assessed twenty-five per cent. of the total cost of said frontage improvement; and the tract of land lying between two lines respectively fifty and one hundred feet distant from and parallel with the line of said street shall be assessed twenty-five per cent. of the total cost of said frontage improvement; provided, that in the assessment of irregular blocks or tracts of land where the distance to the next street is less than two hundred feet, then the cost of both frontage and intersection improvement shall be assessed only upon such portion of said blocks or tracts of lands as are within half the distance to the next street, but this provision shall apply only to fractional blocks or tracts as shown in original plats and not to property adjacent to streets which have been widened by the Common Council of the City of Portland. The cost of improving the intersection of streets, unless otherwise ordered by the council, shall be assessed upon the lots or parts thereof situated in the quarters of the four regular blocks adjoining such intersections, but only upon the lots or parts thereof within the quarter blocks nearest thereto and in the following proportion: Five-ninths of the cost to the corner or first fifty feet, and four-ninths of the cost to the lot next inside or the next fifty feet, as laid out on the recorded plats. In irregular blocks where the distance to the next street or alley is more than two hundred feet, the cost of intersection shall not be assessed for a greater distance than one hundred feet, and shall be in the proportion above named. In irregular blocks of less than two hundred feet to the next street, the cost of

intersection shall be assessed only upon the property within one-half the distance to the next street, and in proportion as described for regular blocks. When any land adjacent to a street improvement and within one hundred feet therefrom shall not be laid off in blocks and lots, the proportionate cost of improving the intersection of streets shall be assessed upon such land as lies within one hundred feet square of the intersection, five-ninths to be paid by the first fifty feet and four-ninths by the next fifty feet abutting the street to be improved.

Blocks two hundred feet square shall be deemed regular blocks and lots fifty feet by one hundred feet be deemed regular lots, and all other sized lots and blocks, irregular lots and blocks. In case where an elevated roadway or bridge shall be included in a street improvement of not less than five blocks in length, the owners of the property abutting on said elevated roadway or bridge shall be assessed in the same manner as before described, at least fifty per cent. of the cost of such elevated roadway or bridge, and the remainder of the cost of such elevated roadway or bridge shall be apportioned and assessed equitably upon all the property liable for the cost of the street improvement; provided, that the Common Council in its resolution of intention described in Section 127 of this act shall state that the cost of elevated roadways and bridges included in any proposed street improvement will be apportioned in the manner above set forth.

Section 139. When the probable cost of any work or improvement has been ascertained or determined, and the proportionate share thereof chargeable to each lot, or part thereof, and to each piece or parcel of land within the limits of such work or improvement has been assessed, as provided in the preceding section, the Common Council must declare the same by ordinance, and must also make an appropriation out of the fund, to be collected from the owners of property assessed for the payment of the cost of such work

or improvement, and direct the Auditor to draw warrants on said fund in favor of the persons entitled thereto, as shown by the acceptance, or acceptances, of such work, or improvement, on file in the office of the Auditor, and shall also direct the Auditor to enter a statement of the probable cost aforesaid in the Docket of City Liens, as provided in the next section.

Section 140. The Docket of City Liens in (is) a book in which must be entered in pursuance of Section 139 the following matter in relation to assessments for the improvement of streets and the construction of sewers:

1. The number or letter of the lot assessed, and the letter or number of the block in which it is situated, and if a separate assessment is made upon a part of a lot, or tract of land, a particular designation of such part or tract.

2. The name of the owner thereof, or that the owner is unknown.

3. The sum assessed upon such lot, or part thereof, or tract of land, and the date of the entry; provided, that a failure to enter the name of the owner thereof, or a mistake in the name of the owner in such entry, or the entry of a name other than that of the true owner in such lien docket, shall not render void or vitiate such assessment, nor in any way effect the lien of the City of Portland on the property described in such lien docket.

Section 141. The Docket of the City Liens is a public writing, and from the date of the entry therein of an assessment upon a lot, or part thereof, or a tract, or parcel of land, the sum so entered is hereby declared to be a tax levied, and a lien upon such lot, part thereof, or tract, or parcel of land, which lien shall have priority over all other liens or incumbrances thereon whatsoever, and any sum or sums of money assessed for the improvement or repair of a street, avenue,

or alley, or for the construction or repair of a sewer or drain entered upon such lien docket, shall not be collected until, by order of the Common Council, ten days' notice is given by the Auditor of such entry as aforesaid, by publication in a daily newspaper published in the City of Portland, and it shall be the duty of the Auditor to send a notice of such assessment by mail when the postoffice address of the owner, or agent, is known.

Section 142. If within thirty days from the first publication of the notice prescribed in Section 141 the sum assessed upon the lot or part thereof is not wholly paid to the City Treasurer, and a duplicate receipt therefor filed with the Auditor, the council shall thereafter order a warrant for the collection of the same, to be issued by the Auditor, directed to the Chief of Police.

Section 143. Such warrant must require the Chief of Police to proceed to collect the unpaid assessment named therein by advertising and selling to the highest bidder the lot, part thereof, or tract of land described in the warrant, in the manner provided by law for the sale and collection of delinquent state and county taxes, and to return the proceeds of such sale to the City Treasurer, and the warrant to the Auditor, with his doings indorsed thereon, together with the receipt of the Treasurer for the proceeds of such sale as paid to him; provided, that all the unpaid assessments for any one improvement or repair of a street, or for the construction or repair of a sewer may be included in one advertisement and notice of sale, but each piece or parcel of land shall be sold separately and for a sum not less than the unpaid assessment thereon and the interest, cost of advertising and sale; and provided, further, that in the execution of said warrant no levy upon the lot or lots, or parcels of land described therein shall be required, except in cases where the owner of the property named in said warrant shall be described as unknown.

Section 144. Such warrant shall have the force of an execution against real property, and shall be executed in like manner, except as in the preceding section specially provided, and the return of the officer executing the warrant must specify the amount for which each lot or part thereof was sold, and the name of the purchaser.

Section 145. The Chief of Police shall immediately after having sold any real property by virtue of such warrant, or of any warrant for the collection of delinquent taxes, make a certificate of sale of the property so sold, setting forth therein the object for which the sale was made, a description of the property sold, a statement of the amount it sold for, of the improvement for which the assessment was made, the year in which the tax was levied, the amount of such tax or assessment, the name of the purchaser, and that the sale is made subject to redemption within three years from the date of the certificate, and then deliver such certificate to the purchaser. The owner, or his successor in interest, or any person having a lien by judgment, decree, or mortgage on any property so sold, may redeem the same upon the conditions provided in the next section.

Section 147. After the expiration of three years from the date of such certificate, if no redemption shall have been made, the Chief of Police shall execute to the purchaser, his heirs, or assigns, a deed of conveyance, containing a description of the property sold, a statement of the amount bid, of the improvement for which the assessment was made, of the year in which the tax was levied, that the assessment or tax was unpaid at the time of the sale, and that no redemption had been made. And the effect of such deed shall be to convey to the grantee therein named the legal and equitable title in fee simple to the real property in such deed described. And such deed shall be *prima facie* evidence of title in such grantee, and that all proceedings and acts neces-

sary to make such deeds in all respects good and valid have been had and done, and such *prima facie* evidence shall not be disputed, overcome, or rebutted, or the effect thereof avoided, except by satisfactory proof of either:—

1. Fraud in making the assessment, or in the assessment or collection of the tax.

2. Payment of the assessment or tax before sale, or redemption after sale.

3. That payment or redemption was prevented by fraud of the purchaser; or

4. That the property was sold for an assessment or tax for which neither said property or the owner thereof at the time of sale was liable, and that no part of the assessment or tax was assessed or levied upon the property sold.

Section 158. The proceedings authorized by this chapter for the establishment or alteration of a grade, or the improvement of a street or any part thereof, may be taken or had without giving notice prescribed in Section 128, whenever the owner or owners of two-thirds of the adjacent property shall, in writing, petition the council therefor. And whenever any street or part thereof shall be in such condition as to become impassable, unsafe or dangerous to persons or teams passing on, along, or over the same, the council may declare the same by resolution, and may thereupon cause the improvement of such street to be made, upon giving ten days' notice by publication in any paper of said city, and no remonstrance shall be heard thereto.

POINTS AND AUTHORITIES.

The rule of assessment that places the whole burden upon particular property without apportionment is not taxation, but taking property without compensation for public use.

1.

Thomas v. *Gain*, 35 Mich. 154.
Village of Norwood v. *Baker*, 19 Sup. Ct. 192.
Agens v. *Mayor*, 37 N. J. Law 416; s. c. 172 U. S. 269.
Tidewater Co. v. *Coster*, 18 N. J. Eq. 519.
Matter of Canal Street, 11 Wendall, 154.
Cooley on Taxation, 453-454.
Cooley's Const. Lim. (3d ed.), p. 508.
Hutcheson v. *Storrie*, 45 L. R. A. 289; s. c. Texas.
City of Seattle v. *Yesler*, 1 Wash. Ter. 571.
Dexter v. *Boston*, 57 N. E. Rep. 379.

2. A rule of assessment that charges each lot with the cost of the improvement in front of it is void.

Village of Norwood v. *Baker*, 172 U. S. 269; s. c. 19 Sup. Ct. Rep. 187.
Motz v. *Detroit*, 18 Mich. 495.
Davis v. *Litchfield*, 21 L. R. A. 563, note; s. c. 145 Ill. 313.
Cooley on Taxation, 453, 454.
Cooley's Const. Lim. (3d ed.), p. 508.
Burrough's Taxation, 465, note 5.
Woodbridge v. *City of Detroit*, ——.
Christiancy, J., 8 Mich. 301, 304.
People v. *Lynch*, 51 Cal. 23.
Chicago v. *Larned*, 34 Ill. 203.
Ill. Cent. R. R. Co. v. *Bloomington*, 76 Ill. 447.
City of New Whatcom v. *Bellingham Bay Co.*, 38 Pac. 163; s. c. 9 Wash. 639.
State v. *Jersey City*, 37 N. J. 129.
St. John v. *City of E. St. Louis*, 50 Ill. 92.
Hutcheson v. *Storrie*, 45 L. R. A. 289.

3. A rule of assessment is void that is not based upon benefits to the property assessed, and the assessment limited to the benefits.

Bonds of Maderia Dist., 14 L. R. A. 755, note.
Village of Norwood v. *Baker*, 172 U. S. 269; s. c. 19 Sup. Ct. 187.
McKee v. *Pendleton*, ——
Baker, C. J., concurring, 57 N. E. Rep. 532.
Mobile Co. v. *Kimball*, 102 U. S. 691-703-704.
Railroad Co. v. *Decatur*, 147 U. S. 190, 202; s. c. 13 Sup. Ct. 293.
Hutcheson v. *Storrie*, 45 L. R. A. 289.
Bauman v. *Ross*, 167 U. S. 548-589; s. c. 17 Sup. Ct. 966.
Masters v. *City of Portland*, 24 Or. 167.
City of Bloomington v. *C. & R. R. Co.*, 134 Ill. 458.
Town of Elma v. *Carney*, 37 Pac. 709; s. c. 9 Wash. 466.
Alleghany City v. *West Ry. Co.*, 138 Pa. 375.
Ill. Cent. R. R. Co. v. *Bloomington*, 76 Ill. 447.
Bridgeport v. *New York, etc., R. R. Co.*, 36 Conn. 255; s. c. 4 Am. Rep. 63.
Hammett v. *Philadelphia*, 65 Pa. 146; s. c. 3 Am. Rep. 615.
Chicago v. *Larned*, 34 Ill. 279.
Tidewater v. *Coster*, 18 N. J. Eq. 518; s. c. 90 Am. Dec. 634.
Wilson v. *City of Salem*, 24 Or. 512.
Meier v. *Kelly*, 20 Or. 96.
Paulsen v. *City of Portland*, 16 Or. 450-460.
Or. & C. R. R. Co. v. *City of Portland*, 25 Or. 229.
Charles v. *City of Marion*, 98 Fed. Rep. 166.
Fay v. *City of Springfield*, 94 Fed. Rep. 409.
Hutcheson v. *Storrie*, 45 L. R. A. 289; s. c. Texas.

4. The benefits must be special—that is, must make the property more accessible or more enjoyable in its use, and do not include benefits common to the community, nor those merely speculative.

Tidewater Co. v. *Coster*, 18 N. J. Eq. 518.
N. Y. R. R. Co. v. *New Haven*, 42 Conn. 279.
State v. *Elizabeth*, 40 N. J. L. 274.
State v. *Elizabeth*, 37 N. J. L. 330.
City of Boston v. *Shaw*, 42 Mass. 130.
Kersten v. *Milwaukee*, 48 L. R. A. 851.

5. Property that from its physical situation cannot be benefited cannot be assessed for improvements, and the courts will inquire into and decide this question.

Or. & C. R. R. Co. v. *City of Portland*, 25 Or. 229.
City of Bloomington v. *C. & A. R. R. Co.*, 134 Ill. 458.
Alleghany City v. *Western Ry. Co.*, 138 Pa. 375.
State v. *Elizabeth*, 37 N. J. L. 330.

6. The owner must have notice and an opportunity to contest the amount of his assessment and the extent of his benefits.

Paulsen v. *City of Portland*, 149 U. S. 30; s. c. 13 Sup. Ct. 753.
Tidewater Co. v. *Coster*, 18 N. J. Eq. 519.
Philadelphia v. *Miller*, 49 Pa. St. 440-448.
Butler v. *Supervisors*, 26 Mich. 22.

Wilson v. *City of Salem*, 24 Or. 509.
Cook v. *City of Portland*, 58 Pac. 353.
Norfolk v. *Young*, 97 Va. 728; s. c. 47 L. R. A. 574.
Charter of Portland, Sec. 138; Sess. Laws 1898, p. 156.

At the risk of some repetition, we append here substantially our argument in the Court below:

ARGUMENT.

At the outset of this argument we emphasize the fact that the method of assessment provided by the Portland Charter is not the front-foot rule. That rule which has been upheld by many state courts, and by the recent decisions of this Court, is a rule of apportionment. It provides a taxing district, lays the burden of the whole improvement upon all the property in the district, and then apportions that burden among the property-owners in proportion to the frontage of their lots. But the Portland Charter does not do anything like that. It lays the burden of improving the one-half of the street in front of each lot upon that lot alone, and makes no apportionment whatever. It is a legislative mandate that every owner shall improve half the street in front of his lot, cost what it may. Is that due process of law?

We have been able to find but very few decisions of state courts, and no single decision of this Court sustaining this method of assessment. On the contrary, the rule, if rule it may be called, has been denounced with practical unanimity by the state tribunals wherever the question has arisen, by learned authors who have discussed it, and, if we mistake not, a method substantially like this has received the disap-

proval of this Court in *Village of Norwood* v. *Baker*, 172 U. S. 269.

From the cases in the courts, and especially in this court, we deduce three valid methods, and only three, by which the legislature may impose special assessments for street improvements upon the property benefited thereby:

First: The legislature may itself designate the taxing district, and ascertain and determine the exact tax to be imposed on the property.

Second: It may confide to a subordinate body the power to designate the community to be taxed, and vest in that body the judicial power and discretion to determine the assessments, upon hearing and notice to the property-owner.

Third: It may make a general rule of apportionment by which the amount of the assessment upon each parcel of property shall be determined.

An example of the first method is found in

Parsons v. *District of Columbia*, 170 U. S. 45; s. c. 18 Sup. Ct. Rep. 521.

An example of the second method is found in

Wight v. *Davidson*, 181 U. S. 371; s. c. Sup. Ct. Rep. 616.

An example of the third method is found in

French v. *Barber Asphalt Paving Co.*, 181 U. S. 324; s. c. 21 Sup. Ct. Rep. 625.

The ground of decisions in cases of the first class is that the determination of the tax assessed by the legislature itself is purely the exercise of the legislative power of taxation.

is not judicial in its nature, and not open to review by the courts.

Parsons v. *District of Columbia*, 170 U. S. 45, citing
Stuart v. *Palmer*, 74 N. Y. 183.
Spencer v. *Merchant*, 125 U. S. 345.
Hagar v. *Reclamation District*, 111 U. S. 701.

The ground of decision in cases of the second class is that the inquiry by the subordinate body is judicial, and when notice is given the taxpayer the judgment resulting is due process of law.

Fallbrook Irrig. Dist. v. *Bradley*, 164 U. S. 112.

The ground of the third class of decisions is that it is discretionary with the legislature to fix a rule of apportionment, and "it may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by the commissioners."

Bauman v. *Ross*, 167 U. S. 548.

But the Portland Charter does not come within the rule or principle of any of the decisions. The legislature did not determine for itself the amount of the tax to be assessed against any of these lots. That tax was to depend upon the cost of the improvement in front of each lot, and that in turn depended upon the determination of the Common Council as to the character of the improvement and upon the nature of the ground and the contract price of the work, all of which was in the future, and unknown to the legislature.

Nor did the legislature vest in the Council or other body any discretion or power to determine the amount of the tax, or whether the property was benefited or how much, nor to make any apportionment between the owners. It is only given the power to order the improvement, and this power is not in any way limited in its exercise to the extent of benefits.

We quote the holding of the court below on this point, as follows:

"The Common Council is empowered by the legislature to fix and determine the taxing district. This it did by adopting the resolution of intention to make the improvement. Its action in this regard is legislative in character, and it was not requisite that the legislature should have provided for notice before the Council was authorized to act. In prescribing the district, it must be presumed, as would have been the case if the legislature had itself acted directly, that it took into consideration the exceptional benefits that would accrue to the property which it was intended should be charged with the burden, because it could inaugurate or make such an assessment upon no other basis."

We understand the very opposite of this to be the settled rule upon the subject. The presumption allowed is only in favor of direct legislative action, and never in favor of the action of the subordinate body. This court states the true rule in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, and quoted approvingly in *French* v. *Barber Asphalt Co.*, 181 U. S. 324, as follows:

"Unless the legislature decide the question of benefits itself, the land-owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in

Spencer v. *Merchant*, 125 U. S. 356.
Walston v. *Nevin*, 128 U. S. 578."

Now, looking at the charter, it is plain that there is no provision for a notice or hearing upon either the question of benefits or apportionment.

Section 127, provides that "whenever the public interest or convenience may require, the Common Council is hereby authorized and empowered to order the whole or any portion, etc., of the streets to be graded, etc." There is not one word here limiting the improvement to property to be benefited.

Then Section 128 provides that "Before work is done or improvement made, etc., the Common Council shall pass a resolution of intention to do so, and describing the work or improvement, which resolution shall be posted conspicuously for ten days in the office of the Auditor, and shall be published for ten days in a daily newspaper published and circulated in the City of Portland, etc.," and this notice is required to state "the time within which written objection or remonstrance may be made thereto."

But what is the object of this notice and the nature of the objection and hearing thereon? That is plainly set forth in the succeeding Section 129: "Within ten days after the final publication of the notice required to be published in the preceding section, the owners of more than one-half of the property abutting on said proposed work or improvement may make and file with the Auditor a written objection or remonstrance against said proposed work or improvement, and said objection and remonstrance so filed shall be a bar to any further proceedings in relation to the doing of said work or making said improvement for a period of six months unless the owners of one-half or more of the property abutting as aforesaid shall subsequently petition therefor."

This is clearly only a veto power given to the owners of a majority of the property. The objection requires no rea-

sons to sustain it, and is effective if made by the requisite number, whether the property is benefited or not. Fewer than the owners of more than one-half the property have no right of objection whatever, and if fewer object they cannot be heard for any reason or many reasons, "though reasons were as plentiful as blackberries."

Then Section 130 provides for the result if no objections be filed by the owners of more than half the property:

"If no such written objection or remonstrance be made and filed, or if any written objection purporting to be signed by a majority of the owners of the property abutting on said proposed work or improvement be by said Council found and determined not to have been legally signed by a majority of the owners of abutting property as aforesaid, the Common Council shall be deemed to have acquired jurisdiction to order the work or improvement described in said resolution of intention to be done, and said Council shall thereafter and within four months from the date of the final publication of said resolution of intention declare by ordinance the time and manner of said proposed improvement, which shall conform in all particulars to the resolution of intention previously adopted."

What room is there here for questioning benefits or assessments? If the Council determines that fewer than the owners of one-half the property have objected, it must, within four months from the notice, order the improvement, and it must make the improvement in only one way, that is, "in all particulars" like that set forth in the resolution of intention. There is no authority to vary either the improvement or except any of the property to be taxed. On the contrary, that authority is excluded as plain as words can exclude it.

And the Council is permitted to order the improvement before it can possibly be known to itself or to anybody on

earth what the probable cost of the improvement may be, and therefore before it can possibly adjudge that the benefits will equal the assessments. The language of the charter in this respect is, "Whenever any work or improvement, the expense of which is to be assessed against the property benefited thereby, has been completed in whole or in such proportion as shall enable the said Board of Public Works to determine the cost of the whole thereof, the City Engineer shall file with the said board a written acceptance of such work so completed." (Charter, Sec. 137.)

Up to this time, i. e., the completion of the work in front of the property to be assessed, the cost, and, therefore, the assessments have not been determined; and up to this time, necessarily, no notice of the amount of the assessments has been given the property-owner. Then a notice is given that the work has been completed and accepted, and objections to the work invited, but these objections and the power of the Board of Public Works to pass upon them are limited to the single question whether the work has been done according to the contract and specifications, and do not include the question of benefits at all. The language is: "And if it appear that said work or improvement has not been completed in accordance with the specifications and contract, the said board shall direct the same to be so completed, and until so done the acceptance or acceptances shall not be approved by said board. If no objections be filed to the acceptance of any work or improvement as herein provided, or if upon hearing the same the board shall determine that the work has been completed according to the specifications and contract, it shall endorse its approval, etc., and file a copy with the Auditor." (Charter, Sec. 137.) After this is all done, then and not till then are the assessments made in the manner already indicated. (Charter, Sec. 138.)

The language of the lower court must, therefore, have been inadvertent when it said of this preliminary notice: "It

was also possible for the Common Council to determine the matter with reasonable accuracy, as the probable cost and distributive share thereof among the holders was known to them, as was also the locality and situation of the property to be assessed." So far from the probable cost being then known to them, the determination to order the improvement is had before the City Engineer has made or reported any estimate or specifications of the improvement. It is only after the approval of the ordinance ordering the work, at the session when the objections are presented, that the Engineer transmits his estimates and specifications in detail, and that estimate is made, not to the Common Council, which orders the improvement, but to the Board of Public Works, which lets the contract. (Sections 131 and 132.)

Nor is the "distributive share" brought to the knowledge of the Common Council or the property-owners when it orders the improvement. The assessment is not made by the Council, but by the Auditor, and it is not made until after the work is completed. (Sections 137 and 138.)

The notice inviting proposals to contractors for bids, though mentioned by the lower court, is so clearly not a notice to the property-owner and affords him no opportunity for a hearing, that we are justified in passing it by without further notice.

The notice to the property-owner to pay his assessment likewise affords him no opportunity to contest his assessment. The notice is given after the lien is recorded in the lien docket, and is plainly intended to give the owner opportunity to pay without a sale of his property. The assessment and lien are already fixed beyond recall.

In speaking of these several notices, the lower court say: "Ample opportunity was thus afforded to the owners to appear and interpose the constitutional objections, which is all that is sought to be done in these proceedings."

Surely that is not valid reasoning. Surely an unconstitutional law is not validated because the Common Council could have declared it unconstitutional and did not. A provision in the law itself for contesting its conformity with the constitution cannot make it conform to that instrument.

It will be seen, therefore, that after the Council has ordered the improvement and determined its character upon considerations only of public convenience, excluding the question of benefits, the subsequent steps are marked with certainty, are purely ministerial, and do not include a discretion anywhere to vary them. The process of determining assessments is automatic.

The conclusion is irresistible, therefore, that this method does not come within the second class of cases referred to, since no authority is vested anywhere to determine either benefits or asssments, at any stage of the proceedings.

If the charter in question comes within any of the three classes described, it is the third class, to wit, where the legislature fixes a rule of assessment and apportionment. But this charter is equally without that class.

Since it is settled that the legislature cannot assess property for this purpose in excess of benefits, and without some equitable apportionment of the burden, it follows that any rule of assessment it adopts must be seen to tend toward these objects. It must be reasonably adapted to the end sought. The standard for determining the assessments must have some relation to benefits and apportionment. An arbitrary rule that on its face has no relation to these subjects, or leads in a contrary direction, cannot be within the legislative power. And this is such a rule.

The legislature does not by this rule determine that all the lands in the city shall be deemed benefited in proportion to the front foot, as in the French-Asphalt Co. case. That standard has some relation to benefits and apportionment,

perhaps. It may be said with some show of reason that ordinarily and usually the greater the frontage, or the value or the area, the greater the benefits. A foot is a foot all the time. But here the determination, if any was made, is that every lot is deemed benefited to the extent and in proportion to the costs of the improvement on the half street in front of the lot, whatever the cost may be. Now the cost is not only a varying and unknown quantity, but it has no connection with either benefits or a just apportionment. It is purely arbitrary, as much so as if the standard were the height or weight of the owner. Or if there be any ratio between them, it is an inverse one. As Mr. Cooley, quoted elsewhere, says, the greater the cost, the less will usually be the benefit, because the unevenness of the ground, which increases the cost, will also decrease the accessibility of the property. This is especially true in a city, which, like Portland, is built upon steep hillsides and which in its lower levels is crossed by innumerable sloughs and depressions requiring bridges and elevated roadways of varying heights.

Since this case was decided in the lower court, this court has distinguished the case of *Village of Norwood* v. *Baker* in

French v. *Barber Asphalt Co.*, 181 U. S. 324; s. c. 21 Sup. Ct. Rep. 625.

Town of Tonawanda v. *Lyon*, — U. S. —; s. c. 21 Sup. Ct. Rep. 609.

Wight v. *Davidson*, 181 U. S. 371; s. c. 21 Sup. Ct. Rep. 616.

Webster v. *Fargo*, — U. S. —; s. c. 21 Sup. Ct. Rep. 623.

In every one of these cases, except the Wight case, the front-foot rule was under consideration, and in that case

the assessments were made by a jury. But the distinctions made in the cases cannot be made in the case at bar. There is no essential difference between what was done in the Norwood case and what was done in this case. In that case the whole cost of opening the street in front of Mrs. Baker's property was assessed upon that property. In this case the whole cost of improving the street in front of the lot of each of these plaintiffs was assessed upon that very lot. The only difference is that in the Norwood case Mrs. Baker was the only person whose property was so assessed, while in the case at bar a number of persons were so assessed at the same time. But it certainly can not validate an invalid assessment, because at the same time there are other invalid assessments.

The case of *Walston* v. *Nevin*, 128 U. S. 578, cited by the lower court in support of its decision, concerns a method of assessment more like our own than any other decision of this court. But the decision here was put distinctly upon the ground that the act of Kentucky vested in the courts of the state a supervision "where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation."

But the Portland Charter provides no such tribunal, and hence the case is not authority against our view.

We call attention that the opinion of the court below and the authorities cited in support of it relate mainly to the front-foot rule. We do not mean, here, in the light of the recent decisions of this court, to controvert that rule. But it is not our rule.

The method of assessment adopted in the charter is not taxation, but is the taking of private property for public use. The charter requires the council to assess the costs of improvements or repairs of a street upon the half street im-

mediately in front of the lot to be assessed. It does not authorize the council to exercise any discretion in making the assessments, or to apportion the taxes amongst the owners of the property to be affected. Mr. Cooley calls this method spoliation. The legislature has no power, under the guise of taxation, to take away a man's property, without paying him for it. It is the taxing power that is not limited, and not the power to call things taxation, which are not taxation. Taxation has certain definite elements, without which it does not exist. For instance, taxation involves the idea of a public purpose to be subserved. If one man's property is taken away from him and given to another, this is not taxation. In the next place, taxation implies the idea of a community of burden. One man cannot be taxed alone. It is true that the city may be divided into taxing districts, and taxes raised in the district for purposes common to that district, but when this subdivision is carried to the extent of making a man's property the taxing district, and the man himself the community to be taxed, the very nature of taxation is departed from.

Upon this question the Supreme Court of New Jersey is quoted approvingly in the case of

. *The Village of Norwood* v. *Baker*, 172 U. S. 269. In this language: "But while it is thus clear that the burden of a particular tax may be placed exclusively on any political district to whose benefit such tax is to inure, it seems to me it is equally clear that when such burthen is sought to be imposed on particular lands not in themselves constituting a political subdivision of the state, we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert with the least show of reason, that the legislative act to select the subject of taxation is not a limited right, for it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be

contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable."

Agens v. *Mayor*, 37 N. J. L. 416-420-423.

Taxation implies justice and equality; that is to say, exact equality of taxation between individuals may not be necessary, but the taxes to be raised must be laid upon the individuals in the community in some just proportion as between themselves, so that the burden may rest with some degree of equality upon every member. If all, or any of these elements are lacking, then the legislature has not exercised the power of taxation, but some other power. Applying this to the case at bar, it is apparent that the whole amount of the taxes necessary for the improvement is not divided among the owners of the property in any proportion whatever. The method is to tax each lot with a specific sum that has no relation to the taxes upon any other property in the district. There is no community of burden in apportionment, and the taxing district is each particular piece of property taxed. It makes no difference that a number of persons are taxed in the same proceeding and in a similar manner. That does not make it a community burden, nor does it make any difference that the whole tax is levied upon all the property in the district. The fact is that the whole tax is found by adding together the taxes of each individual lot, and the tax on each individual lot is not found by dividing the whole tax upon any basis of apportionment whatever. No man's assessment has any relation to any other man's assessment, and is neither increased nor diminished by that of his neighbor.

We quote upon this subject from Mr. Cooley: "But a very different case is presented, when the legislature undertakes to provide that each lot upon a street shall pay the

whole expense of grading and paving the street along its front. For, while in such a case there would be something having the outward appearance of apportionment, it requires but slight examination to discover that it is a semblance only, and that the measure of equality, which the constitution requires, is entirely wanting. If every lot-owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors; nothing is divided or apportioned between them; and each particular lot is in fact, arbitrarily made a taxing district, and charged with the whole expenditure therein, and thus apportionment avoided. If the tax were for grading the street, simply, those lots which were already at the established grade would escape altogether; while those on either side, which chance to be above or below, must bear the whole burden, though no more benefited by the improvement than the others. It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits, as ought to be the cardinal idea in every tax law." And in a note, the author further says, "In fact, lots above and below an established grade, are usually less benefited by the grading than the others, because the improvement subjects them to new burdens in order to bring the general surface to the grade of the street, which the others escape." And the author further says: "It would be nakedly and arbitrarily the command of the law to each lot-owner to construct the street in front of his lot at his own expense, according to a prescribed standard, and a power to issue such command could never be exercised by a constitutional government; unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction, and fit for passage; but any such idea is clearly inadmissible."

The author further criticises the only case that can be quoted on the other side of this question, and says, "The case of

Warren v. *Hurley*, 31 Iowa, 31,

Is opposed to the reasoning of the text, but the learned judge, who delivers the opinion, concedes that he is unable to support his conclusions on the authorities within his reach." And the author further says: "It would be nakedly and arbitrarily the command of the law to each lot-owner to construct the street in front of his lot at his own expense, according to a prescribed standard, and a power to issue such command could never be exercised by a constitutional government; unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage, but any such idea is clearly inadmissible."

The case of

Weeks v. *Milwaukee*, 10 Wis. 258,

Which seems to be *contra*, but which in reality is not, is mentioned in a foot note (Cooley's Constitutional Limitations, page 626, note 1). The reasoning of the Court in that case is all against the justice and equity of the rule; but the Court, after denouncing the rule, upholds its constitutionality under a power in the Constitution of Wisconsin as follows: "It shall be the duty of a legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations." The Wisconsin Court held that this was a power given by the constitution itself to the legislature, to make such assessments, but Judge Cooley attacks this opinion with invincible logic.

This Wisconsin case also refers to the case of

Hill v. *Higdon*, 5 Ohio N. S. 243,

But, as Judge Cooley shows, that case was an assessment by the foot front, which is a very different rule.

The author says, speaking of the method like that of the Portland Charter: "If such a regulation constitutes the apportionment of a tax, it must be supported, when properly ordered by, or under the authority of the legislature; but it has been denied, on what seemed the most conclusive grounds, that this is permissible. It is not legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property; and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot, those circumstances not at all contributing to make an improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing district whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a state officer chanced to be chosen should pay his salary, or that that locality in which the standing army or any portion of it should be stationed for the time being should be charged with its support. If one is legitimate taxation, the other would be. In sidewalk cases, a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively. As has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced

contribution, not a tax within the sense of those terms as applied to the exercise of powers by an enlightened or responsible government."

Cooley, Taxation, 1st ed. 453.

The Supreme Court of New Jersey denounced a similar rule, and said: "The question now arises, whether the assessment for grading is valid. So much of it as compels each lot to bear the expense incurred in front of it, whatever that may be, cannot be sustained, as such a principle must often work great injustice, making the lowest lot, where the most filling is required, bear the heaviest expense.

State v. *Jersey City*, 37 N. J. L. 129.

In New Jersey the legislature authorized an assessment on the owners of lots in proportion of two-thirds of the cost, the other third to be paid out of the city treasury. The court held that the legislature had the constitutional right to put the expense of paving the street as a special burden on the property in the neighborhood of such improvement; and held also that this power was limited. It declared this method unconstitutional, because the method did not take into consideration the special benefits to the property arising from the improvement. The New Jersey rule was not only not so onerous as our Portland rule, but it had the same vice that our charter has, in this, that the legislature, in the law itself, particularized the property should be taxed, and charged against the property an assessment without regard to benefits. The court cites with approval, the case of

Tidewater Co. v. *Coster*, 18 N. J. Eq. 518,

Which decides that the cost of improvement may be imposed on particularized property to the extent to which such prop-

erty was exceptionally benefited, and in the last-named case, Chief Justice Green defines the kind of benefits that must exist, as follows: "The theory on which such assessments are sustained as a legitimate exercise of the taxing power, is that the property assessed is locally and peculiarly benefited over and above the ordinary benefit, which as one of the community he received in all public improvements to the precise extent of the assessment."

State v. *Newark*, 37 N. J. L. 416.

The last-named case was cited again, and the same principle applied in

State v. *Jersey City*, 37 N. J. L. 129.

In the last-named case the rule as to a part of the work was the same as the Portland rule. The Court said: "The question now arises, whether the assessment for grading is valid. So much of it as compels each lot to bear the expense incurred in front of it, whatever that may be, cannot be sustained, as such a principle must often work great injustice, making the lowest lot, where the most filling is required, bear the heaviest expense"; as is the case with some of the lots in this assessment. In

Ill. Central Railroad Co. v. *City of Bloomington*, 76 Ill. 447.

The court decided that it was unconstitutional to compel a railroad company to pay the expense of constructing a crossing over said railroad for a street, because either that improvement would have to be made by a general tax, or assessed against the property benefited, and to the extent of the benefit. This case cites

The City of Chicago v. *Larned*, 34 Ill. 203,
The City of Ottawa v. *Spencer*, 40 Ill. 211,
Bedard v. *Hall*, 44 Ill. 91,

To the effect that the whole burden of paving a street upon the frontage of the property adjoining the improvement is repugnant to the constitution, and that in making such improvement, the benefits must be assessed upon all property enhanced in value thereby, and imposed on the same to the extent of the benefits, if required. In

St. John v. *The City of E. St. Louis*, 50 Ill. 92,

The assessment was for the improvement in front of the lot, as in our charter. The Court held this to be in conflict with the Constitution of Illinois, which provides for equality of taxation by the corporate authorities of cities and towns. In the case of

Thomas v. *Gain*, 35 Mich. 154,

The law provided that the Common Council should declare, by resolution, what lands would be benefited by the sewer, and then they were to make an assessment in proportion to the number of superficial feet therein.. The Court, by Cooley, Judge, said: "The principal objection made to the assessment is that it is not apportioned among the parties benefited upon any principle recognized in the law. That it is made on a basis arbitrary, and consequently cannot be justified as an exercise of the taxing power. It is not claimed that an assessment by benefits would be inadmissible, but it is insisted that an assessment by the area of lots, irrespective of proportionate benefits, is nothing but a levy of arbitrary exactions, and therefore unconstitutional." The

Court then noticed the frontage rule, which has been often upheld, and then said: "But it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting a demand to appropriate private property to public uses." This idea is strongly stated in

Tidewater Co. v. *Coster*, 18 N. J. Eq. 519,

Which has often been cited with approval in other courts. "It is admitted that the legislature may prescribe the rule for the apportionment of benefits; but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal, as between the parties assessed. For it is not conceivable that the rule prescribed is one that will apportion the burden justly, or with such approximate justice as is usually attainable in tax cases; it must fall to the ground like any merely arbitrary action which is supported by no principle. The only discretion which the act in question allows to the Common Council as an assessing board is in determining what lands are benefited by the improvement. When that determination is made, the rule of apportionment is fixed, and it must be made according to the area. It is not required that the lands shall be contiguous to each other, or that the benefits to be taken into account shall be only the direct benefits to the land. We find nothing in the act to preclude the taxation of lands remote from the sewer, if their market value, actual or speculative, is increased by the improvement of it. While this increase of value might be a reason for general taxation, for sewer purposes, it is manifest that it could not possibly warrant an apportionment by superficial area, since that, under no circumstances could be just, unless limited to land directly and peculiarly benefited. But this act makes no provision by which parties assessed may of right drain into the sewer, so as to be enabled to reap the benefits they ought to derive from the ex-

penditure. And the Court says that when the assessment is levied by an arbitrary standard, which requires the burden to be laid upon lands far from the sewer and only slightly benefited, equally with those fronting upon it, and greatly benefited; it is manifest that it must not only work injustice, but that in some cases it may amount to actual confiscation. It is not, therefore, legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits, and when injustice must result from its adoption, we have no alternative but to reject the assessment as an unlawful exaction. It is an assessment made in entire disregard of the principle upon which special assessments can only be sustained, the principle, namely, that those who enjoy the benefits shall equally bear the burden; citing

Wright v. *Boston*, 9 Cush. 233-241.
Matter of Washington Avenue, 69 Penn. St. 360.
Patterson v. *Society*, 24 N. J. 385.

In *Lee* v. *Ruggles*, 62 Ill. 47, the land assessed for a sewer was divided by the law into three classes, the first class being the highest rate of taxation, and to be a percentage on the assessment of the county treasury for the year 1869, and in no case exceeding 50 cents per acre; the second class not to exceed 40 cents per acre, and the third class not to exceed 30 cents per acre. This was held to be void as against the Constitution of Illinois, following

City of Chicago v. *Larned*, 34 Ill. 279.

To the effect that there did not exist, under the constitution, a power of apportioning taxes, whether of a general or of a local character, except on the principle of equality and uniformity. The Court said: "It would not follow that the lands would be benefited to the extent of the amount of

money expended in the drainage of them, much less that any particular tract would be benefited to the extent of the tax imposed upon it. Manifestly a tax, assessed upon such a basis, would not be one assessed upon each tract of land, only to the extent of the special benefits conferred on it." In the case of

Tidewater Co. v. *Coster,* 18 N. J. Eq. 519,

The assessment was for draining tidewater marshes, and the commissioners were employed to assess upon the lands when reclaimed a just proportion of the contract price. This was held void, inasmuch as the expense to be levied on the land was not limited in amount to the extent of the benefit to be conferred. In this case the statute was held void, because it did not require that the apportionment of expense should be limited as to the maximum rate, by the increase in the value to result from the improved condition of the land. This case cites the

Matter of Canal Street, 11 Wendall, 154,

To the effect that excess over the benefits is private property taken for public use without just compensation. And further citing the following cases:

Matter of Fourth Avenue, 3 Wend. 452.
Matter of Albany Street, 11 Wend. 149.
Matter of William & Anthony Sts., 19 Wend. 678.
Matter of Flatbush Avenue, 11 Barb. 286.
Nichols v. *City of Bridgeport,* 23 Conn. 204.
State v. *Newark,* 37 N. J. L. 185.

The Supreme Court of Texas has recently applied the doctrine of *Norwood* v. *Baker,* overruling all former decisions of the Texas Court holding to the contrary. This

case, *Hutcheson* v. *Storrie*, is instructive, because it declares unconstitutional a charter substantially like ours, the language of which is as follows: "The cost shall be defrayed, in case of street improvements, by the owner or owners of the lot or lots, block or blocks, tracts of land, when not laid out into lots and blocks, abutting on such street or portion of street improved, according to the cost of work in front of the particular lot or block or tracts of land."

The Texas Court held that no discretion was lodged with the city council to determine the assessment, but that the charter absolutely fixed the rule by which the assessment is to be governed, just as ours does, and for that reason, and because no provision was made for determining the benefits, it was held to be within the rule laid down in *Norwood* v. *Baker*.

Applying the doctrine of these cases to the case at bar, we find that the Portland Charter does not vest in the City Council any authority under this procedure, to make any other assessments, than according to the costs of the repair or improvement in front of each particular lot, and therefore it does not authorize the Common Council to consider the question of benefits at all. When a majority of the property holders petition the council for an improvement or repair, or when it is declared to be expedient to make a repair without any petition, then the council must order the improvement or repair to be made in the particular manner designated in the charter, and it makes no difference what the cost thereof may be to any particular property-owner, he has no right, under this charter, to question whether this improvement or repair is beneficial to him or not. Nor, if he did question it, can the Common Council hear his complaint, or give him any relief whatever.

The next objection we make to the assessment in this case is that the assessment is for building an elevated road-

way, and that the property, by reason of the physical situation thereof, and its relation to the roadway, cannot be benefited by the same. All of the authorities concur in holding that the benefits mentioned in this rule mean those that accrue to the property specially, and not those that are enjoyed in common with the rest of the community.

In this case testimony was taken of the members of the council, who each sought to uphold the assessments by giving what he considered to be the benefits derived to the property by the improvements. We invite attention to this testimony. Every one of these gentlemen testified that the bridges did enhance the value of the property, but every one admitted that property could not be reached from the bridge, except by climbing down or jumping off; and not one was able to point out any particular benefit to the property, except upon the assumption that a superstructure could be built on the property, which would be upon the grade of the street and bridge, and that the property so improved would be benefited by the bridge. The authorities that we cite elsewhere show that it is the present condition of the property that must be taken into consideration in determining the benefits, and not some future and hypothetical condition of it. It would be manifestly unjust to compel the property-owner to pay taxes upon property which he does not see fit to improve in a certain way, or to use in a certain way, based upon such use as a council, in their wisdom, would have him use it.

It is quite true that this roadway benefits in a general way all the property in a community, including plaintiffs' other property, but that manifestly cannot be considered in this case.

In the case of

Alleghany City v. *Railroad Co.*, 138 Penn. St. 375.

An attempt was made to assess the right of way of a railroad for the purpose of improving a street that lay parallel

with it, the roadbed of the railroad company being some fifteen feet below the level of the street. The court held that the assessment was void, because from the first the right of way of a railroad could not possibly be benefited by the street, and that this one could not be benefited from the fact that it was below the level of the street.

There is a rule in Pennsylvania that the property-owner cannot defend on the ground that his property is not benefited by the improvement, because the law presumes such benefit; but notwithstanding this rule, the Court said that where the courts can declare, as a matter of law, that no benefit can arise, the legislature is powerless to impose upon the property the burden of special assessments. This case holds, moreover, that the constitutionality of assessments can only be sustained upon the ground that the property assessed is benefited by the improvement.

In the case of

The City of Boston v. *Shaw*, 42 Mass. 130,

The assessment was for a sewer, and there were some vacant lots lying along it. The assessment was made upon the valuation of the lots if there had been a house upon the land at that time. The Court said that such an assessment was not according to the intended ordinance, even if the ordinance itself were valid. The ordinance was held to be unreasonable and unjust, and that the assessment should have been in proportion to the value of the several estates.

In the case of

Bloomington v. *C. & A. R. R. Co.*, 134 Ill. 458,

It was held that an improvement of the street could not be charged against a railroad company, because it was of no benefit to the company, but an injury. In

O. & C. R. R. Co. v. *City of Portland*, 25 Or. 229,

The Court held that an assessment was void because the

property could not possibly be benefited. There seems to have been two grounds for this conclusion, namely, that the roadway was not used by the public, and that it being elevated above the property no benefit could arise thereto.

New York R. R. Co. v. *New Haven*, 42 Conn. 279,

Holds that to authorize a special assessment the benefits must be direct and certain, not remote and contingent; and the case of

State v. *Elizabeth*, 40 N. J. L. 274,

Holds that the benefits must be present and peculiar, not merely intended or speculative. In the case of

State v. *Elizabeth, supra,*

The commissioners assessed a part of the cost of a sewer upon lots which had no lateral connection with the sewer, upon the idea that a sewerage system to be made in the future would bring these lots into connection with the main sewer; but the Court held that such a benefit was not immediate and special and was void. In

State v. *Elizabeth*, 37 N. J. L. 330,

The assessment was for a railroad crossing made upon the railroad company. The Court held that this avenue did not cross the railroad, nor any of its depots, therefore no benefit was derived from the improvement, by reason of increasing facilities of access to its depot, and the probable increase of business thereby. It was also held that the assessment could not be supported on the other ground, of benefits conferred in the advantage derived in the improvement of the company's lands, for the uses to which they are appropriated. The proof was that the paving across the railroad track was an injury, rather than a benefit to the company. In this case, also, there was an assessment for constructing a sewer. The Court held that this might be a benefit to the company's

lands by draining the lands, but that the assessment was void because the sewer made no connection with the lands of the railroad company, and was of no benefit to such lands; and that the future building of sewers, to make such connections, could not be considered.

Against these authorities, counsel for respondents rely upon the case of

King v. *The City of Portland*, 2 Or. 146.

On examination of that case and of the briefs printed with the opinion, it will be seen that the questions we make against this charter were not raised or decided in that case. The principal contention was that the constitution of the state, Section 33, Article 1, Section 1, Article 9, and Section 5, Article 2, prohibited the assessment for street improvement. After deciding that the power exercised is the taxing power, and referring to Section 32, Article 1 of the Constitution, the Court say: "Does that section cover taxation or burdens for all purposes, general and local, state and municipal, revenue and benefit?" And stating the case made by appellants, the Court say: "Appellants insist that if the council had the legal right to declare the mode of payment for such work, it should have been done under Section 32, above cited, and that a tax, equal and uniform in its burden upon all property within the corporation of Portland, should have been levied." And so the Court decided, as shown by the authorities cited in the language of the opinion, that the provision concerning equality or uniformity of taxation in the constitution does not require that all of the property in the city should be taxed to pay for a particular local improvement. That it was never meant in that decision to decide the question we raise is shown further, by the language of the Court, as follows: "We see no reason, had we the right, for saying that the apportion-

ment of the expenses for improving the streets upon the abutting lot is not as equal in its burden as any other means. The legislature holds that matter in their discretion, and has exercised that discretion, and we may not say it has erred." This plainly shows that the court had not in mind that the Charter of the City of Portland did not in fact provide for the apportionment of the expense of the improvement.

It was not intended, or decided in that case, that the property can be taxed without being benefited, or that no apportionment is necessary, or that, if its physical situation precluded a benefit, it could be taxed; or that the assessment could be made without notice or opportunity to contest it.

The language of the Court on page 150 further illustrates the ground of the decision. The Court say: "When the City Council decide upon the improvement of a street, that body may proceed, without any possible hinderance or objection to ascertain and determine the probable cost of making same, and assesses upon each lot, or part thereof, its proportional share of such cost. The whole of the matter, as regards expense and apportionment, belongs to the discretion or judgment of the council, and the same charter declares that discretion or judgment as final, and in no wise reviewable." The Court did not, apparently, notice that the said charter then in force was like that in force in the present case, in the respect that the lot was liable for the full cost of improving one-half of the street immediately adjacent to each lot, and of one-half of the intersections where such exist; otherwise it could not have declared that the apportionment belongs to the discretion or judgment of the council. It is quite clear that under such a provision, no discretion is lodged in the council to make any apportionment or to vary the assessment in any particular from the cost of the half street in front of it.

From these considerations, we contend that the case is not a point against us, but if it be otherwise, then the case would be in direct conflict with the later decisions of this Court, and with the case of *Norwood* v. *Baker,* and ought to be expressly overruled.

Respectfully submitted,

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